CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 663

CHARLES E. GAY, JR., RECEIVER OF SAVANNAH & ATLANTA RAILWAY, PETITIONER,

vs.

MAJOR RUFF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 15, 1933

CERTIORARI GRANTED JANUARY 15, 1934

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN SUPERIOR COURT OF WARREN COUNTY

ORIGINAL PETITION—Filed Jan. 25, 1933

The petition of Major Ruff, hereinafter referred to as the plaintiff, complains against Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway, hereinafter referred to as the defendant, and shows:

1

The Savannah & Atlanta Railway is a Georgia corporation, with its residence and principal office at Savannah, Georgia, and operating a line of railroad in said State from Savannah, Georgia, to Warrenton, Georgia.

2

That on the — day of ——, 19—, the defendant, Charles E. Gay, Jr., was appointed as Receiver of said Railway Corporation by the Judge of the United States Court of the Southern District of Georgia, in the exercise of equity powers of that court and since said date, said defendant as such Receiver has been engaged in carrying on the business connected with such railway property, to-wit: the operation of the same as a railroad.

3

That while so engaged in operating said railroad property as such Receiver, the said defendant injured and damaged the plaintiff in the sum of Five Thousand ($5,000) Dollars by reason of the facts hereinafter alleged.

4

On September 21, 1931 at about daylight, freight train No. 211, pulled by Engine No. 500, while being operated by the employees of said Receiver, ran over and killed the minor son of plaintiff, one Joseph Ruff.

5

Said homicide occurred at Reese's Crossing, in Warren [fol. 3] County, Georgia, about six miles from Warrenton, Georgia. Just prior to the time when he was run over by said railroad train, said Joseph Ruff was lying on the track unconscious as a result of either seizure of illness or of intoxication, the exact cause of his being on said track being unknown to plaintiff. The track of The Savannah & Atlanta Railway is straight for one half a mile or more from the direction in which the train was coming, to wit, from Savannah to Warrenton, and the agents of the defendant operating the engine and train at said time and place were able to see and did see the said Joseph Ruff lying on the track several hundred yards away from the point at which he was lying, which was at or near Reese's Crossing.

The said agents of the defendant rang the bell and blew the whistle of the engine on approaching said Crossing, as required by the statute and in an effort to arouse said Joseph Ruff, whom they saw even at that distance, lying on the track ahead of them;

When the train reached a point within about one hundred (100) yards where the said Joseph Ruff was lying on the track, the said Joseph Ruff was awakened by the whistle and bell of the engine and his conduct, manner and demeanor was such as to indicate to the agents of defendant operating said train that he was not in control of his facilities because when he awoke he stood up in the middle of the track with a wild look in his eyes and instead of making any effort to get off the track, merely jumped up straight in the air, so that the engine and train of defendant ran over and killed him.

6

Plaintiff shows that in the exercise of ordinary care and caution, the agents of defendant operating the engine and train of defendant knew or ought to have known that the said Joseph Ruff was not in posssession and control of his senses and that it was their duty in the exercise of or- [fol. 4] dinary care and diligence, to have stopped said train, which they had ample time to do after they saw the condition of said Joseph Ruff, but which they did not do

because they supposed that he would get off of the track before the train could strike him; under these circumstances, plaintiff alleges that the failure of defendant's agents to entirely stop said train after they saw that the man on the track was helpless and lacked control of his facilities, was a failure to exercise ordinary care and diligence in order to prevent the homicide that occurred.

7

Plaintiff shows that at the time of said homicide, said Joseph Ruff was nineteen years of age and died without leaving a wife, child or children, or representative of child or children, or a mother surviving him and that plaintiff is the father of said Joseph Ruff, upon whom plaintiff was dependent and to whose support the said Joseph Ruff contributed.

8

That at the time of the homicide, said Joseph Ruff had an earning capacity of at least Twenty-five ($25.00) Dollars per month as a farm laborer, and his capacity to earn money would have increased as he grew older.

9

Plaintiff sues for the full value of the life of his said son, which he alleges to be the sum of Five Thousand ($5,000) Dollars.

Wherefore, Plaintiff prays that process may issue requiring the said defendant, Charles E. Gay, Jr., Receiver of the Savannah & Atlanta Railway, to be and appear at the next term of the Superior Court of said County to answer this complaint.

Thos. W. Hardwick & Isaac S. Peebles, Jr., Attorneys for Plaintiffs.

[fol. 5] State of Georgia,
Warren County:

In Superior Court of Warren County

Major Ruff

versus

Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway

Process—Filed Jan. 25, 1933

Complaint

To the Sheriff of said county and his lawful deputies, Greeting:

The Defendant, Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway, — hereby required personally or by attorney, to be and appear at the Superior Court, to be held in and for said County on the First Monday in April, next, then and there to answer the Plaintiff's demand in an action of complaint, as in default thereof the Court will proceed as to justice shall appertain.

Witness the Honorable C. J. Perryman, Judge of said Court, this 25 day of January, 1933.

A. E. Massengale, Clerk.

[File endorsement omitted.]

[fol. 6] Georgia,
Warren County:

I have this day served a copy of the within petition and process on Savannah and Atlanta R. R. Co. by giving a copy of same to Henry Ricketson, Agent of said defendant, in charge of their office at Warrenton, said State and County.

This the 26th day of January, 1933.

J. S. Buckhalter, Dep. Sheriff, Warren Co., Ga.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION

Law. 447

MAJOR RUFF

vs.

CHARLES E. GAY, JR., Receiver of Savannah & Atlanta Railway

PETITION FOR REMOVAL.—Filed Feb. 21, 1933

Damages

To the District Court of the United States for the Southern District of Georgia, Augusta Division:

Now comes the above named defendant, Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, and respectfully shows:

1. The above entitled suit at law was filed in the Superior Court of Warren County, Georgia, a State court, held in and for said County and State, on January 25, 1933, and is returnable to the April Term, 1933, thereof, which convenes on the first Monday, the 3rd day of April, 1933. In said suit, Major Ruff is the plaintiff and Charles E. Gay, Jr., as Receiver of Savannah & Atlanta Railway, is defendant.

2. Petitioner desires to remove said suit from the said State court to this Honorable Court pursuant to the provisions of Judicial Code Section 33 as amended, R. S. 643, 28 U. S. C. Section 76.

3. There has been no trial of said suit or any final hearing thereof, and this petitioner, defendant therein, is not required to plead thereto or to otherwise appear therein until the 3rd day of April, 1933. Said suit will not be ripe for trial until the July Term 1933 of said Superior Court of Warren County, Georgia, which convenes on the first Monday in July next. This District Court of the United States for the Southern District of Georgia, Augusta Division, is the District Court of the United States next to be holden in the District and Division where the said suit is pending.

[fol. 8] 4. The said suit is in the nature of a civil suit for damages, in the sum of $5,000.00, for the alleged negligent homicide averred by the plaintiff therein to have been suffered and sustained by his minor son, Joseph Ruff, on or about September 1, 1931, which homicide it is averred was proximately caused by negligence of your petitioner, the defendant therein, as Receiver of said Savannah & Atlanta Railway, in the performance of his duty as such Receiver, in and about the management and operation of the property and trains of the said Savannah & Atlanta Railway in his custody and control as such Receiver.

5. Heretofore, to-wit, on or about March 4, 1921, petitioner was duly appointed as Receiver for the Savannah & Atlanta Railway by an order of the District Court of the United States for the Southern District of Georgia, Savannah Division, in a certain Equity cause therein pending, and then entitled Theodore G. Smith and John B. Johnston, plaintiffs, against Savannah & Atlanta Railway, defendant, in Equity, Receivership, etc., and being Case No. 90 on the Equity docket of said Court; and continuously thereafter petitioner has been acting as such Receiver, and is now so acting, by virtue of the orders of this Honorable Court, the said receivership proceeding, however, by a consolidation with other causes, now being entitled The Farmers' Loan & Trust Company, Trustee, complainant, against Savannah & Atlanta Railway and Charles E. Gay, Jr., defendants, Consolidated cause in Equity No. 256 on the Equity docket of said Court.

6. Your petitioner duly qualified as such Receiver in accordance with the provisions of the orders of this Court as aforesaid, and is now so qualified, and is in charge and control of the property, assets, management and operation of the said Savannah & Atlanta Railway, and as such Receiver was at all times mentioned in said complaint filed by Major Ruff, and now is, an officer of a court of the United States; and the said suit filed by the said Major Ruff is a civil suit or action against petitioner as such officer of a court of the United States, for and on account of [fols. 9 & 10] alleged acts done by him under the color of his office, or in the performance of his duty as such officer of a court of the United States.

7. By reason of the foregoing facts, your petitioner as such Receiver and officer of a court of the United States is entitled under the provisions of the Judicial Code of the United States herein mentioned, as amended, to remove the said plaintiff's suit from the Superior Court of Warren County, Georgia, a State court, to the District Court of the United States for the Southern District of Georgia, Augusta Division.

Wherefore your petitioner prays that the above entitled suit by the said plaintiff be entered on the docket of this court, and proceed as a cause originally commenced in this court, would proceed; and that the Clerk of this Court be directed to issue a writ of certiorari to the said Superior Court of Warren County, Georgia, convening at Warrenton, Georgia, in said County, requiring it to send to this court all the records and proceedings in said cause, and to stay all further proceedings in said State Court.

E. P. & J. Cecil Davis & Hitch, Denmark & Lovett,
Attorneys for Petitioners.

Duly sworn to by Charles E. Gay, Jr. and A. B. Lovett. Jurats omitted in printing.

[fol. 11] In United States District Court

Order for Writ of Certiorari—Filed Feb. 21, 1933

Upon motion of A. B. Lovett, Esq., of Hitch, Denmark & Lovett, Attorneys-at-Law, of Savannah, Georgia, of counsel for the defendant in the above case, and on filing of the petition of Charles E. Gay, Jr., as Receiver of Savannah & Atlanta Railway, and the District Court of the United States for the Southern District of Georgia now being in session,

It is ordered that a writ of certiorari issue herein to the Superior Court of Warren County, Georgia, a State court, requiring said court to transmit the record and proceedings in the said cause, entitled Major Ruff versus Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, at Law, Damages, to this Court, so that the said District Court of the United States may act thereon as of right and according to law ought to be done.

Further ordered that said writ be served by the Marshal of this Court upon the Clerk of said State Court, unless service thereof by said Clerk be acknowledged or waived.

In open Court, this the 15th day of February, A. D. 1933.

Wm. H. Barrett, United States Judge.

[fol. 12] In United States District Court

Writ of Certiorari—Filed Feb. 21, 1933

The President of the United States of America to the Superior Court of Warren County, Georgia, a court of the State of Georgia, held in and for Warren County, Georgia, at Warrenton, Georgia, in this Judicial District and Division, Greeting:

Being informed that there is now pending before you a suit filed January 25, 1933, wherein Charles E. Gay, Jr., as Receiver of the Savannah & Atlanta Railway, appointed as such by the District Court of the United States for the Southern District of Georgia, Savannah Division, is defendant, and Major Ruff, is plaintiff, and that said suit is brought against an officer of the Court of the United States for or on account of alleged acts done by him under color of his office or in the performance of his duty as such officer; and that the trial or final hearing thereof has not yet been had; and it appearing that the District Court of the United States for the Southern District of Georgia is now in session, and an order for this writ of certiorari to issue having been entered by the Honorable William H. Barrett, United States Judge of said Court, presiding;

Therefore, the District Court of the United States for the Southern District of Georgia does hereby command you that you send without delay to the Augusta Division of said District Court as aforesaid the record and proceedings in said cause, so that the said District Court of the United States may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Barrett, Judge of the District Court of the United States for the Southern District of Georgia, at Savannah, Georgia, this 15th day of February, A. D. 1933.

Scott A. Edwards, Clerk, United States District Court for the Southern District of Georgia.

(Court Seal.)

[fol. 13] GEORGIA,
Warren County:

I, A. E. Massengale, as Clerk of the Superior Court of Warren County, Georgia, in and for said County and State, at Warrenton, Georgia, certify and acknowledge that I have received the original writ of certiorari, of which the within and attached is a duplicate copy, issued out of the United States District Court for the Southern District of Georgia, Augusta Division, by Scott Edwards, Clerk of said District Court, said writ of certiorari having been issued on the 15th day of February, A. D., 1933, to the Superior Court of Warren County, Georgia, in and for said State and County, at Warrenton, Georgia, requiring it to send to the District Court of the United States for the Southern District of Georgia, Augusta Division, the record and proceedings in the cause of Major Ruff versus Charles E. Gay, Jr., as Receiver of said Savannah & Atlanta Railway; and that said writ of certiorari has this day been filed in the office of the Clerk of the Superior Court of Warren County, Georgia, in and for said County and State at Warrenton, Georgia.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Superior Court of Warren County, Georgia, in and for said County and State, at Warrenton, Georgia, on this the 17 day of February, A. D., 1933.

A. E. Massengale, as Clerk of the Superior Court of Warren County, Georgia, in and for Said County and State. (Seal.)

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND—Filed April 1, 1933

Now comes the plaintiff in the case above stated and moves to remand said case to the State Court for trial therein, upon the following grounds, to-wit:

1

Because the defendant herein is not "an officer of the courts of the United States" within the purview and true intent and meaning of the Acts of Congress approved Au-

gust 23, 1916, amending Section 33 of the Judicial Code of the United States (U. S. Code, Title 28, Section 76).

2

Because the suit filed by the plaintiff in the State Court and removed to this Court is not a civil action against the defendant "for or on account of any act done under color of his office, or in performance of his duties as such officer" within the purview and true intent and meaning of said Act of August 23, 1916, amending Section 33 of the Judicial Code of the United States.

3

Because in said suit the plaintiff brought action against such defendant as Receiver of such railroad property "in respect to acts or transactions of his in carrying on the business connected with such property" and that said action was properly brought in the State Court within the purview and true intent and meaning of Section 66 of the Judicial Code of the United States as amended (U. S. Code, Title 28, Section 125), and for that reason, and under said statute, the said suit was properly brought in the Superior Court of Warren County, Georgia, and is not removable to this Court on the sole ground, as shown by the petition for removal in this case, that the defendant is an officer of this Court and is being sued in the State Courts for and on account of alleged acts done by him under color of his office or in the performance of his duty [fol. 15] as an officer of a court of the United States.

4

Because this Court has no power to remove said suit from the State Court and no jurisdiction to hear and determine the same.

Wherefore, Plaintiff submits this written motion to remand and prays that the said suit and all proceedings therein be remanded to the State Court, namely, to the Superior Court of Warren County, Georgia, for disposition therein.

Thos. W. Hardwick & Isaac S. Peebles, Jr., Attorneys for Movant.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

OPINION AND JUDGMENT DENYING MOTION TO REMAND Filed April 3, 1933

WM. H. BARRETT, District Judge:

The receiver of the Savannah & Atlanta Railway was appointed by the United States District Court for the Southern District of Georgia.

Major Ruff, brought suit in the state court against said receiver to recover damages for the alleged negligent killing of his son by the agents of the receiver by operating a train on the line of said railway. Acting under the authority of Section 76 of Title 28 U. S. C. A., R. S. 643, said case was removed by the receiver to the United States district court of the division in which is included the county where such suit was brought.

Plaintiff moves to remand said cause upon the following grounds:

1. The defendant is not "an officer of the courts of the United States", within the purview and true intent of said Section 76.

2. Because said suit is not a civil action against the defendant "for or on account of any act done under color of his office, or in performance of his duties as such officer" within the purview of such section.

3. Because said suit was brought against such receiver "in respect to acts or transactions of his in carrying on the business connected with such property" and such action was properly brought in the state court within the purview and true intent of Section 125 of Title 28 U. S. C. A., and is therefore not removable.

4. Because this court has no power to remove said suit from the state court and no jurisdiction to hear and determine the same.

It is important to understand exactly the language and the dates of the respective statutes involved.

[fol. 17] The aforesaid section 125, which is the act of March 3, 1887, as amended on August 13, 1888, reads as follows:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect

of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the Court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

At the date of the enactment of said section 125 the relevant parts of section 76 reads as follows:

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law" said suit or prosecution may by prescribed proceedings be removed to the appropriate United States court.

On August 23, 1916, the said section was amended by incorporating therein after the last words of the aforesaid quotation, namely, "revenue law", the following:

"* * * or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer."

1. It is both appropriate and convenient to deal with grounds 1 and 2 of the motion to remand in this one section.

"It is frequently and authoritatively said that a receiver is an officer of the court appointing said receiver."

Clark on Receivers, Section 34, citing, among many other authorities, Porter v. Sabin, 149 U. S. 473; Stuart v. Boulware, 133 U. S. 78; Booth v. Clark, 17 How. (58 U. S.) 321; Quiney v. Railway Co., 145 U. S. 82; Union Bank v. Kansas City Bank, 136 U. S. 223; Atlantic Trust Co. v. Chapman, 208 U. S. 360.

Among other allegations in the original petition in this [fol. 18] case are the following:

"* * * the defendant, Charles E. Gay, Jr., was appointed as Receiver of said Railway Corporation by the judge of the United States Court of the Southern District of Georgia, in the exercise of equity powers of that Court and since said date (date of appointment), said defendant as such Receiver has been engaged in carrying on the business connected with such railway property, to wit: the operation of the same as a railroad.

That while so engaged in operating said railroad property as such Receiver, the said defendant injured and damaged the plaintiff in the sum of Five Thousand ($5,000) Dollars by reason of the facts hereinafter alleged."

In view of such allegations and decisions it is difficult to understand upon what bases can be soundly rested the contentions either that the receiver is not an "officer of the courts of the United States" or that the original action in this case was not "for or on account of any act done under color of his office or in the performance of his duties as such officer".

There is abundant authority that a receiver is such an officer of court. Matarazzo v. Hustis, 256 Fed. 887; American Locomotive Co. v. Histed, 18 Fed (2nd) 656; Newell v. Byram (D. C.), 18 Fed. (2nd) 657 (C. C. A. 8th), 26 Fed. (2nd) 200; Berens v. Byram, 26 Fed. (2nd) 953; Elliott v. Wheelock, 34 Fed. (2nd) 213; Barnette v. Wells Fargo National Bank, 270 U. S. 438.

2. Grounds 3 and 4 of the motion to remand are dealt with together. Movant urges that such section 125 is a special act dealing only with suits "in respect of any act or transaction of his in carrying on the business connected with such property", and that the general act of 1916, amending said section 76, cannot have the effect of repealing said section 125, under the well established principle that a prior special act is not repealed by a subsequent general act unless it is specifically so declared or "the implication to that end be irresistible". Rogers v. United States, 185 U. S. 83; Petri v. Creelman Lumber Co., 199 U. S. 487; Ex parte United States, 226 U. S. 420; Washington v. Miller, 235 U. S. 422.

It is further urged by movant, that in view of the decision of the Supreme Court of the United States in Gableman v. Peoria Railroad Co., 179 U. S. 335, and especially in view of the sub quoted statement by Chief Justice Fuller, [fol. 19] the whole purpose of the act of 1887-1888 would be defeated if the right of removal existed and that therefore the intention to repeal such special act by implication does not exist, and that if Congress had intended so to repeal such act it would have explicitly done so.

For appreciation of the cogency of this argument if is essential to exactly understand the Gableman case. This case was before the Supreme Court on a certificate which states that the receiver removed the cause into the circuit court, on his sole petition, "upon the ground that it was a case arising under the Constitution and laws of the United States"; and again, "The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal court * * *."

It is thus manifest that the question for determination was in exceedingly narrow limits, namely: did the appointment of a receiver by a federal court cause all of his actions as such receiver to arise "under the Constitution and laws of the United States"?

The inevitable sequitur from this is that all statements not involved in the decision of this one question are obiter. The decision was that such appointment of a receiver did not have such effect.

In discussing the said act of 1887-1888 the Chief Justice, on page 338, used this language:

"This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed

to Congress, and, moreover, such a right would be inconsistent with the general policy of the act."

[fol. 20] It is respectfully submitted that the statements contained in the last quoted paragraph are obiter. Even if the right of removal had been embodied in the acts of 1887-1888 there would have been at least two most important rights accorded to plaintiffs. First, because even if removal were allowed it would be in the proximate neighborhood of the plaintiff, because the removal must be to the district court in whose territory the county where the suit was brought is located, relieving of the necessity of going into some distant jurisdiction, and frequently into another state, in order to assert one's rights; and, second, the right of a jury trial was preserved. It must follow therefore that the right of removal was not necessarioy destructive of the policy evidenced by such act.

Under the foregoing analysis of said act which conclusion is proper: that urged by the movant, that the act of 1887-1888 was a special act and is therefore not repealed by the act of 1916, or that the act of 1916 should have the full effect of its language and therefore it repealed pro tanto such portion of said act of 1887-1888 as prevented a removal, if said original act had such effect?

The language, as above quoted, of said act of 1887-1888, that the receiver "may be sued in respect of any act or transaction of his in carrying on the business connected with such property", and the language of the said act of 1916, as embodied in said section 76, that any officer of a court of the United States may remove when suit is brought against him "for or on account of any act done under color of his office or in the performance of his duties as such officer", seems to me to manifest that the same subject matter is being dealt with. If it were intended that the act of 1916 should not have effect upon the removability of causes, authorized by the act of 1887-1888, Congress would inevitably have used some exception rather than use in substance the same language dealing with the same subject matter. This view is strengthened because there is still left as the effects of the act of 1887-1888 the rights above stated.

[fol. 21] It is further urged by movant that because the act of 1887-1888 and also the amending act of 1916 are both incorporated in the United States Code, Ann., that therefore it was the purpose of Congress not to repeal or modify

the act of 1887 1888. It does not so appear to me. No one contends that the act of 1887 1888 was repealed totally by the removability act of 1916, and it was mandatory that the act of 1887 1888 should be incorporated in such Code. It was the imperative duty of the codifiers to incorporate all existing statutes and not to act as a court in determining what or to what extent there was conflict or repeal.

For a further discussion of the issue here dealt with see Newell v. Byram, 26 Fed (2nd) 202, and cases there cited.

Unless the decision of the Supreme Court in Barnette v. Wells Fargo Co., supra, is misconceived this question is decided definitely by the highest court. In the first place, the suit therein involved was not a question of possession of property that was turned over to the receiver at the time of his appointment, but was an action that was alleged to have arisen by fraud on the part of the receiver (predecessor of the one sued) in obtaining certain property by duress, and therefore arose "for or on account of any act done under color of his office or in the performance of his duties as such officer". While it is true that it is recognized, both in the opinion of the court and in the dissenting opinion, that the record did not affirmatively disclose the authority for the removal from the State court to the United States court, the court states (after the following: "* * * we think the presumption should be indulged that the removal was rightly taken, and that the District Court had jurisdiction"):

"The plaintiff contended and the District Court held that, even if there had been no such leave, the suit could be maintained under the legislative permission given in Section 66 of the Judicial Code; but we need not consider that question".

It thus affirmatively appears that the Supreme Court did [fol. 22] know that the district court had decided that the aforesaid section 66 had the effect contended for by the receiver here and took no exception to such conclusion.

The motion to remand is denied.

This 3rd day of April, 1933.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CASE. Filed April 10, 1933

The above stated case having been called in its regular order on the docket for trial, at this, the trial term thereof, the same having been removed by the defendant to this court from the Superior Court of Warren County; and it appearing to the Court that the plaintiff is not prepared to prosecute the same,

Now, on motion of counsel for the defendant, it is ordered and adjudged by the Court that said cause be, and the same hereby is, dismissed for want of prosecution, at the cost of the plaintiff.

In open Court, this the 10th day of April, A. D. 1933.

Wm. H. Barrett, United States Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL. Filed May 27, 1933

To the Honorable William H. Barrett, District Judge:

The above-named Major Ruff, plaintiff in the cause above stated, feeling aggrieved by the decree dismissing his said cause entered in the above entitled case on the 10th day of April, 1933, during the April term of said Court, does hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons set forth in the assignment of errors filed herewith and he prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such Court in such cases made and provided; and the said Major Ruff, plaintiff in said cause, hereby petitions the Court that he be allowed to prosecute such appeal as a poor person under the provisions of Section 832 of the United States Code, Title 28, and in that connection, submits herewith to the Court his affidavit setting out that because of

poverty, he is unable to pay the costs of said appeal or to give security for the same and that he believes that he is entitled to the redress he seeks in such appeal;

Appellant further shows that on January 25, 1933, he filed his action against the said Gay, who was operating the said Savannah & Atlanta Railway as Receiver thereof by virtue of the decree of the District Court of the United States for the Southern District of Georgia, for the wrongful and negligent homicide of his minor son, one Joseph Ruff, on or about September 1, 1931, which homicide, plaintiff averred, was proximately caused by the negligence of said Receiver and his agents and servants in and about the management of the property and trains of the Savannah & Atlanta Railway in his custody and control as such re- [fol. 25] ceiver; that said appellant is entitled to maintain the above action under the provisions of Section 4424 of the Code of Georgia and was entitled to institute and try the same in the Superior Court of Warren County, Georgia, under the provisions of Section 60 of the Judicial Code of the United States (Title 28, U. S. C., Section 125);

That subsequent to the institution by appellant of said suit in the State Court, the defendant therein removed said suit to this Honorable Court for trial therein under the provisions of Section 33 of the Judicial Code of the United States, as amended (Title 28, U. S. C., Section 76).

Subsequently thereto, appellant moved in open court to remand said case to the State Court in which it had been instituted for trial therein, said motion being made on the 1st day of April, 1933, and on April 3, 1933, the United States District Court, during the term, denied said motion to remand said case to the State Court, to which judgment refusing to remand the said case, appellant then and there excepted and still excepts;

Subsequently, on April 10, 1933, in open court and during the April term, 1933, of the United States District Court aforesaid; said court entered up final judgment, on motion of counsel for defendant, dismissing said case of the plaintiff for want of prosecution, to which judgment appellant then and there excepted and still excepts.

Appellant contends that the Act of Congress of 1916, amending Section 33 of the Judicial Code of the United States, so as to include within its terms "any officer of the Courts of the United States for or on account of any act

done under color of his office or in performance of his duties as such officer", does not embrace and include suits against a Receiver of the Courts of the United States "in respect of any act or transaction of his in carrying on the business connected with such property", as provided in Section 66 of the Judicial Code of the United States and that such suits are not removable to the Courts of the United States on the sole ground that they are brought [fol. 26] against one of its Receivers, notwithstanding the amendment contained in the Act of 1916 to Section 33 of the Judicial Code of the United States.

In this connection, appellant avers that he has a meritorious cause of action against said Receiver and that according to the best of his knowledge and belief, the allegations contained in his petition filed against said Receiver in the State Court, are true and correct, and he believes in good faith that he is entitled to recover in said suit; appellant further avers that he believes and is advised by his counsel that he is entitled to the redress that he is seeking in this appeal to review and correct the ruling of the District Court in denying his motion to remand his said case to the State Court for trial therein.

Appellant attaches hereto his affidavit setting forth his right to appeal as a poor person under the provisions of the statute in such cases made and provided and also a certificate from his counsel to the effect that in the opinion of such counsel, appellant is entitled to the redress he seeks in such appeal.

Wherefore, your petitioner prays that this his appeal be allowed and that he be allowed to prosecute the same as a poor person.

Major *Ruff*, His (X) Mark, Petitioner. Thomas W. Hardwick & Isaac S. Peebles, Attorneys for Petitioner.

AFFIDAVIT

GEORGIA,

Warren County:

In person appeared before the undersigned, Major Ruff, colored, who being duly sworn, deposes and says that each and every statement made in the foregoing petition is true; that because of his poverty affiant is unable to pay the cost of appeal to the Circuit Court of Appeals for the Fifth Circuit in the said case, or to give security for the same

and that he believes he is entitled to the redress sought by [fol. 27] him in his said appeal.

Major Ruff, His (X) Mark.

Sworn to and subscribed before me this 12th day of May, 1933. Claudie V. Geriner, N. P., Richmond Co., Ga. (Notarial Seal.)

CERTIFICATE OF THOMAS W. HARDWICK

GEORGIA,

Richmond County:

To the Honorable William H. Barrett, United States Judge:

I, Thomas W. Hardwick, counsel for Major Ruff, colored, do hereby certify to the Court that in my opinion, Major Ruff, plaintiff in the cause of Ruff v. Gay, Receiver, who is petitioning for the right to prosecute an appeal therein from the judgment of the District Court of the Southern District of Georgia, Augusta Division, to the United States Circuit Court of Appeals for the Fifth Circuit, has good ground for such appeal and is entitled to the redress he seeks therein.

This 25 day of May, 1933

Thomas W. Hardwick, of counsel of record for appellant.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL IN FORMA PAUPERIS Filed May 27, 1933

The above and foregoing petition for appeal is hereby allowed and ordered filed. Let citation issue in terms of the statute and be served upon the said Charles E. Gay, Receiver.

It is also ordered that the showing made by the said applicant for appeal is, in the opinion of the Court, in good faith and upon the showing made, the appellant, Major Ruff, colored, is entitled to prosecute the same as a poor person in accordance with the provisions of the statute in such cases made and provided, and it is so ordered by the Court.

This May 25th, 1933.

Wm. H. Barrett, U. S. Judge.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed May 27, 1933

And now comes Major Ruff, the plaintiff (appellant) in the above stated case and in connection with the appeal thereof, makes the following assignment of error, which he avers were committed by the District Court in said case:

1

The Court erred in over ruling and denying the plaintiff's motion to remand the said case to the Superior Court of Warren County, Georgia, for trial therein; order of the Court herewith assigned as error being of date April 3, 1933.

2

The Court erred in entering final judgment dismissing the case of plaintiff in said District Court; said order of the Court herewith assigned as error being of date April 10, 1933.

Wherefore the plaintiff (appellant) prays that said errors may be considered and corrected and that the judgment of the District Court aforesaid dismissing his said case be reversed and that his said case be remanded to the State Court for trial therein.

Thomas W. Hardwick & Isaac S. Peebles, Jr., attorneys for appellant; post office address: 411-416 Marion Building, Augusta, Georgia.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed May 27, 1933

Be it remembered that on the — day of March, 1933, the defendant in the above stated case caused to be removed to this Court from the Superior Court of Warren County, Georgia, a certain cause then and there pending between Major Ruff, plaintiff, against Charles E. Gay, Jr., as the Receiver of the Savannah & Atlanta Railway, the same being

an action for damages by the plaintiff, Ruff, for the negligent homicide of his minor son, Joseph Ruff, against the defendant, Gay, as Receiver appointed by the United States District Court aforesaid for said Savannah & Atlanta Railway, on account of the negligence of said Receiver and his agents in carrying on the business of said railway property;

Such suit was removed by said defendant under the provisions of Section 33 of the Judicial Code of the United States, as amended, and was legal in form and duly filed in said United States District Court in accordance with the terms of the statute; the said motion to remove, with accompanying papers, being filed in this Court on the — day of March, 1933.

Subsequently thereto, Ruff, the appellant herein, moved in open court to remand said case to the Superior Court of Warren County, in which court it had been instituted, for trial therein, said motion being made on the 1st day of April, 1933, and duly filed on the same day; and on April 3, 1933, the United States District Court, during the term, denied said motion to remand said case to the said State Court, to which judgment refusing to remand said case to said State Court the appellant then and there excepted and still excepts; said judgment being a part of the record, duly filed.

Subsequently, on April 10, 1933, in open court and during the term of the United States District Court, the said Court [fol. 31] entered up final judgment, on motion of counsel for defendant, dismissing said case of the plaintiff (appellant) for want of prosecution, to which judgment appellant then and there excepts and still excepts; said order dismissing said case was duly filed as a part of the record in said case on April 10, 1933.

Now, in furtherance of justice and that right may be done to the plaintiff (appellant), Major Ruff, said Major Ruff tenders and presents the foregoing as his bill of exceptions in this case to the action of the Court and prays that the same may be settled and allowed by the Court and made a part of the record.

This 25th day of May, 1933.

Thomas W. Hardwick, Isaac S. Peebles, Jr., attorneys for appellant; post office address: 411-416 Marion Building, Augusta, Georgia.

[fol. 32] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions having been by Major Ruff (appellant) presented within the time required by law for as much as the above and foregoing matters as set forth in this Bill of Exceptions do not fully appear of record and the plaintiff (appellant) tenders this his bill of exceptions reserved and prays that the same be allowed; I, the undersigned, United States District Judge, who presided at the trial of said case, have settled and herewith signed said Bill of Exceptions and make the same a part of the record in said case.

This 25th day of May, 1933.

Wm. H. Barrett, United States Judge, Southern District of Georgia.

The above and foregoing bill of exceptions is hereby approved as containing a true statement of the matters therein set out. May 25, 1933.

Hitch, Denmark & Lovett, Attorneys for Charles E. Gay, Receiver of Savannah & Atlanta Railway.

[File endorsement omitted.]

[fol. 33] Citation, in usual form, showing service on Hitch, Denmark & Lovett, filed May 27, 1933, omitted in printing.

[fol. 34] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT—Filed May 27, 1933

To the Clerk of the United States District Court for the Southern District of Georgia:

The plaintiff (appellant) in connection with his appeal in the above stated case specified the following portions of the record as material to the determination of his appeal and requests that the same be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to be filed in that Court

on or before the ___ day of June, 1933.

1. Plaintiff's suit against the defendant originally filed in Warren Superior Court.

2. The petition and all other papers in connection with the removal by the defendant of the above stated case from Warren Superior Court to the United States District Court for the Southern District of Georgia, Augusta Division.

3. The motion of plaintiff (appellant) to remand said case from the United States District Court to the Superior Court of Warren County for trial therein.

4. The order and judgment of the United States District Court denying and refusing to remand said case to said State Court for trial therein, dated and filed April 3, 1933.

5. The order and judgment of the United States District Court dismissing the case of the plaintiff (appellant) in said District Court, dated and filed April 10, 1933.

6. The petition of Ruff for appeal, with accompanying exhibits and order of Court allowing same.

7. The assignment of errors of appellant.

8. The bill of exceptions and the order of the Court set-
[fol. 35] tling and allowing the same.

9. The citation to the appellee and his acknowledgment of service thereon.

10. This præcipe.

This 25 day of May, 1933.

Thomas W. Hardwick & Isaac S. Peebles, Jr., Attorneys for Appellant. Post Office address: 411-416 Marion Building, Augusta, Georgia.

It is agreed that the foregoing præcipe specifies all of the record material to the appeal in this case. May 25, 1933.

Hitch, Denmark & Lovett, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] Minute entry of argument and submission, Oct. 5, 1933, omitted in printing.

[fol. 38] In United States Circuit Court of Appeals for the Fifth Circuit

No. 7008

Major Ruff, Appellant,

versus

Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, Appellee

In Forma Pauperis

Appeal from the District Court of the United States for the Southern District of Georgia

November 15, 1933

Before Bryan, Sibley and Hutcheson, Circuit Judges

Opinion of the Court—Filed November 15, 1933

Hutcheson, Circuit Judge:

Plaintiff Ruff brought this suit in the Superior Court of Warren County, Georgia, against the defendant Gay, as receiver of the Savannah & Atlanta Railway by appointment of the United States District Court for the Southern [fol. 39] District of Georgia, for damages for the death of his son, alleging it to have been caused by the negligent operation of one of its trains. A petition filed by the receiver for an order of removal under Sec. 76, 28 U. S. C. A., Sec. 33 Judicial Code as amended, was granted. Ruff's motion to remand was denied, and his suit dismissed for want of prosecution. He appeals.

A judgment of dismissal for want of prosecution is a final judgment, and appealable. Colorado Eastern Ry. vs. Union Pacific Ry. Co., 94 Fed. 342; Wilson vs. Republic Iron & Steel Co., 257 U. S. 92; Zandig vs. Etna Life Ins. Co., 42 Fed. (2) 142. After a final judgment a refusal to remand may be reviewed on appeal. Ex Parte Rowe, 234 U. S. 70; Wilson vs. Republic I. & S. Co., supra.

If the refusal to remand was erroneous, the judgment of dismissal was. That the defendant was an officer of a United States court, and that in the conduct of the business of the railway he was carrying out his duties as an officer

of the court, the point so much, and we think so vainly, labored in the Matarazzo case, 256 Fed. 882, and in the other Federal decisions relied on to sustain the action of the lower court, Newell vs. Byram, 18 Fed. (2) 657, 26 Fed. (2) 300; American Locomotive Co. vs. Histed, 18 Fed. (2) 656, Elliott vs. Wheelock, 34 Fed. (2) 243, goes, we think, without saying. We turn then to a consideration of the controlling question, whether, as appellant contends, the invoked section applies only to actions and proceedings brought personally against the receiver; that is, to hold him responsible in his own person or property (Glover vs. Chicago Ry., 16 Fed. (2) 609) or whether, as appellee contends, it applies also to cases brought against him in his representative capacity, where, "with respect to the question of liability, he stands in the place of the corporation," [fol. 40] McNulta vs. Lockridge, 141 U. S. 131,[1] with the result that all suits against receivers are now removable. We are certain that the amendment was not intended by the Congress to so result. For fifty years its policy has been to restrict, not to enlarge, Federal jurisdiction. Particularly has this attitude been manifested in regard to actions against receivers, Act of March 3, 1887, Title 28, Sec. 125, U. S. C. A., Gableman vs. Peoria Ry., 179 U. S. 335.[2]

Note 1.—"His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations for causes of action accruing under their predecessors in office. Polk vs. Plummer, 2 Humphreys 500. Jansen vs. Ostrander, 1 Cowan 670. If actions were brought against the receivership generally or against the corporation by name, 'in the hands of' or 'in the possession of' a receiver, without stating the name of the individual, it would more accurately represent the character or status of the defendant. * * * Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." McNulta vs. Lochridge, 141 U. S. 331-332.

Note 2.—See discussion of this point, Barnett vs. Wells Fargo, 270 U. S. 451.

To us it seems bizarre and fanciful to say that by an amendment of three lines, tucked away in a section of the Code relating entirely to the removal of suits and prosecutions against revenue officers, and officers of the Congress, a section having no relation whatever to receivers nor even generally to removals, it was intended to make a secret breach in the removal laws. A breach which, in entire reversal of the settled policy of restriction, opens the flood gates of the jurisdiction to pour into the Federal courts all suits against Federal receivers, including, according to some decisions, even those brought under the Federal Employers Liability Acts, the removal of which is expressly forbidden. Behrens vs. Byram, 26 Fed. (2) 953; Elliott vs. Wheelock, 34 Fed. (2) 213, through Knapp vs. Byram, 21 Fed. (2) 217 in the same circuit, is to the contrary. No sounder, safer rule "for the sure and true interpretation of all statutes [fol. 41] in general, be they penal or beneficial, restrictive or enlarging of the common law," has ever been laid down than that set out in Heyden's Case.[4] Under it significance and effect must, if possible, be accorded to every word of the statute. Under it, "every part of the statute must be construed in connection with the whole, so as to make all

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Note 3.—Tennessee vs. Davis, 100 U. S. 257.

Note 4.—"In Heydon's Case in 1584, after all the Barons of the Exchequer had openly argued in court, it was unanimously resolved by Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer, that for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: (1) what was the common law before the making of the Act: (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato comodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico." 3 Co. Rep. 7a (76 English Reports, Full Reprint 637).

the parts harmonize, if possible, and give meaning to each." Market Co. vs. Hoffman, 101 U. S. 115; Ex Parte Public Bank, 278 U. S. 104. So construing the statute, we are left in no doubt that "the mischief and defect" for which the statute, before its amendment, did not provide, was not the failure of the statute to authorize receivers to remove actions "against the corporation in their name" into the Federal court; it was the failure of the statute to extend to officers of the United States courts the privilege of removal which before only revenue officers, and persons acting for them, and for the Congress, had enjoyed. Maryland vs. Soper, 270 U. S. 9; Smith vs. U. S. 58 Fed. (2) 735; Davis vs. S. Carolina, 107 U. S. 597. Had the Congress been intending to remove the mischief which the trial court thought the amendment aimed at, that receivers could not remove into Federal courts suits "against the corporation by name in the hands of or in the possession of the receiver," McNulta vs. Lockridge, supra. Had that been "the true reason of the remedy" no statute more unsuited [fol. 42] to afford the remedy because more unrelated to the mischief could have been chosen for amendment, unless indeed the Congress had the intention to make an unsuspected breach in the removal laws, by hiding that breach away in a secret place.

But we are not left to construction to determine what its real intention was. Introduced first in the House on April 6, 1916, as H. R. 14299, the amendment was immediately referred to the House Committee on the Judiciary.[5] On May 27 it was reported back without amendment, accompanied by H. R. 776 Vol. 3. In the light of this report the construction the trial court put on this statute, unreal enough without it, appears yet more unreal. It declared that "outside of typographical corrections, the bill is a recital of the old law, with only one change" by which the words "or against any officer of the courts of the United States for or on account of any act done under color of his office, or in the performance of his duties as such officer" are intended to be inserted. "The purpose of the amendment" says the Report, is "to extend the provisions of Sec.

Note 5.—Congressional Record p. 5619 First Session 64th Congress.

Note 6.—Congressional Record p. 8830.

33 uniformly to officers of the courts of the United States not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws and to officers of the Congress. The omission of such provision from the original Act gives rise to certain incongruities and creates a want of uniformity in the provisions of the law.'" "The statute, with the proposed amendment, does [fol. 43] not extend in any degree the jurisdiction or the powers of the courts of the United States. It merely provides a more orderly method of procedure which enures as much, in fact more, to the benefit of the States than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal, so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for a trial before a court and jury. * * * It will be observed therefore, that the effect of the proposed amendment does not increase or enlarge the jurisdiction of the Federal Courts, and is confined solely to giving to the officers of the Federal courts, in case of prosecution in their official capacity, a regular

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NOTE 7.—"For example, a United States marshal engaged in the execution of a warrant, or other process of a United States court, in a case which involves the prosecution of a violation of the revenue laws, is entitled to the right of removal now conferred by this statute. Davis vs. So. Carolina, 107 U. S. 597 (1882). The same marshal engaged in executing process of the same court in a case in which the revenue law is not involved, is not entitled to the right of removal. This creates an anomolous condition, which cannot be justified upon any line of reasoning."

NOTE 8.—"During the early history of our government the only method by which the supremacy of the Federal law could be maintained in cases in which actions were brought in the State courts against Federal officers, on account of acts done by them in the performance of their duties, was by appeal to the Federal courts from the judgment of the courts of last resort of the States.

The obvious inadequacy of this remedy by appeal caused the Congress to pass statutes authorizing writs of habeas corpus and these were extended by various enactments. Whitten vs. Tomlinson, 160 U. S. 231-239 (1895)."

and orderly right of removal from the State to the Federal courts, instead of compelling such officers to resort to the present remedy by writ of habeas corpus, which would require the officers to go into custody in order to obtain the writ."

Without discussion or amendment in either House or Senate, the bill as thus reported was passed.

Barnette vs. Wells Fargo Nat. Bank, 270 U. S. 438, relied on as supporting the removal, does not do so. Aside from the fact that the holding of the majority opinion, that in the absence of a showing in the record as to the real ground of the removal, it might be assumed that the suit was properly removed under Sec. 33 as amended, was, because of the absence of such showing, a purely suppositious one, [fol. 44] and therefore not binding as a precedent, it cannot be determined what the case actually held on the point under discussion here, since it does not appear whether the suit was against the receiver personally, or "against the corporation in this name."[9]

The section invoked by the receiver is without application to this suit; the remand was improperly denied, the suit improperly dismissed.

The judgment is therefore reversed with directions to set aside the dismissal and remand the cause to the State court.

[fol. 45] In United States Circuit Court of Appeals

No. 7008

Major Ruff

versus

Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway

Judgment—November 15, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for

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Note 9.—This is clearly pointed out in the dissenting opinion pages 449-450 and 451.

the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed with directions to set aside the dismissal and remand the case to the State court;

It is further ordered and adjudged that the appellee, Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, be condemned to pay the costs of this cause in this Court.

[fol. 46] In United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted]

Motion for Order Staying Mandate—Filed November 22, 1933

Now comes Charles E. Gay, Jr., Receiver of Savannah & Atlanta Railway, appellee in the above case, and moves the court for a stay of mandate and execution and enforcement of the judgment entered in this case on November 15, 1933, for a period of three months after the entry of such judgment, and shows to the court that he intends to apply for and to obtain if possible a writ of certiorari from the Supreme Court of the United States to review the said judgment of this Court, and that a mandate should be stayed for that length of time to enable him to make application therefor.

Movant offers, if the court requires, to give good and sufficient security, to be approved by a Judge of this Honorable Court, that if he fails to make application for such writ within the period allowed therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he will answer for all damages and costs which the appellant may sustain by reason of the stay; but, in this connection, shows to the court that there is no money judgment or decree involved in said case un-

[fol. 47] der the judgment of the court which he will seek to review, nor is the same for a recovery of any specific property, but the points at issue between the parties re-

late entirely to the jurisdiction of the court, and arise under a motion to remand said case to the State court after its removal to the United States Court by appellant, and for that reason movant says no bond should be required.

(Signed) E. P. & J. Cecil Davis, Hitch, Denmark & Lovett, for Appellee. (Signed) A. B. Lovett, of Counsel.

[fol. 48] In United States Circuit Court of Appeals for the Fifth District

[Title omitted]

Order Staying Mandate. Filed Nov. 22, 1933

On consideration of the application of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of November, 1933.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 49] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI Filed January 15, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for argument on Monday, February 12, next, immediately following No. 19, Original, Ex Parte: L. W. Baldwin and Guy A. Thompson, Trustees, etc., et al., petitioners.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.